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# "Where the Cause of Action Accrued": How Florida's Venue Statute Violates the Policy It Designed to Protect

Kristen Nelson Royal

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## “WHERE THE CAUSE OF ACTION ACCRUED”: HOW FLORIDA’S VENUE STATUTE VIOLATES THE POLICY IT WAS DESIGNED TO PROTECT

*Kristin Nelson Royal\**

### Abstract

Venue is the “proper or a possible place for a lawsuit to proceed,” and its purpose is to ensure all possible fairness and convenience for parties to litigation, especially the defendant. Florida Statute § 47.011 provides three places where venue may be proper: the county where the defendant resides, the county where the cause of action accrued, and the county where the property in litigation is located. Although determining where a defendant lives or where property is located is fairly simple, determining where a cause of action accrued can prove more difficult. In an action for tort, courts have indicated that the cause of action accrues where the tort is complete. Florida courts have created two competing tests to determine where torts are complete: the “effects test” and the “overt acts test.” While the effects test is proper according to the correct interpretation of the accrual provision of § 47.011, it may violate policy by laying proper venue in counties where defendants have no connection, thus disadvantaging them. In contrast, the overt acts test advances the policy behind venue by producing results that are fair to defendants, but it is nonetheless improper according to the correct interpretation of § 47.011. This Note argues that because the only accurate interpretation of § 47.011 contravenes the policy it was designed to advance, the Florida legislature should amend Florida’s general venue statute to eliminate the accrual provision.

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INTRODUCTION

Section 47.011 of the Florida Statutes sets forth Florida’s general venue provisions.<sup>1</sup> The purpose of venue is to ensure fairness and convenience for parties to litigation, especially the defendant. Venue achieves its purpose by placing limitations on the potential counties where the plaintiff can choose to bring suit. Accordingly, § 47.011 provides that there are three counties where the plaintiff may bring an action: the county where a defendant resides, the county where property in litigation is located, and the county where the cause of action accrued. Unfortunately, an evaluation of the venue statute as applied reveals that the “accrual” provision of § 47.011 violates the purpose venue was

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1. FLA. STAT. § 47.011 (2015).

intended to serve because it disadvantages the very defendants it was designed to protect.

Although determining where a defendant resides or where property in litigation is located is fairly simple, determining where a cause of action accrued is somewhat more complicated and requires help from the judiciary. In actions for tort, courts have indicated that the cause of action accrues where the tort is complete. Completion is especially difficult to decipher when the essential elements of the tort take place in different locations. The Florida District Courts of Appeal (DCAs) developed the "effects test" and the "overt acts test" to establish where the completion of this type of tort occurs.<sup>2</sup> An analysis of these two tests and their application demonstrates the inequity of the accrual provision of Florida's venue statute.

Despite the fact that the effects test is proper according to the correct interpretation of the accrual provision of the venue statute, it yields venue results that disadvantage defendants by forcing them to appear in court in counties to which they have no connection. This stands in direct opposition to the purpose that venue was meant to serve. In contrast, the overt acts test produces defendant-friendly results that advance the goals of venue. Although the overt acts test aligns with the policy behind venue, it is not proper according to the correct interpretation of the accrual provision of the venue statute.

Part I of this Note discusses the origin and purpose of venue as well as Florida's venue statute specifically. Part II evaluates the Florida DCAs' interpretations of the accrual provision of § 47.011, particularly those decisions articulating the effects test and the overt acts test. Part III explains why both tests are flawed and further argues that because courts cannot accurately interpret § 47.011 without a test that contravenes the policy it was designed to advance, the Florida legislature should amend Florida's general venue statute. Part IV proposes a remedy for the potential inequity—a venue statute that does not include an accrual provision.

## I. VENUE: ITS ORIGIN, ITS PURPOSE, AND WHAT IT LOOKS LIKE IN FLORIDA

Venue is an ancient concept rooted in English jurisprudence and is intended to ensure the convenience of parties to litigation, especially the defendant. Though statute prescribes modern venue at the federal level<sup>3</sup>

2. See *Tucker v. Fianson*, 484 So. 2d 1370, 1371 (Fla. Dist. Ct. App. 1986); *Langan Eng'g v. Harris Constructors, Inc.*, 743 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1999) (per curiam).

3. 28 U.S.C. § 1391 (2012) ("Venue generally"). For a discussion of venue at the federal level, see Jordan G. Lee, Note, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit in Any District?*, 56 FLA. L. REV. 673, 676–79 (2004).

and in most states,<sup>4</sup> the origin of venue is rooted in common law. Understanding the origin and development of venue is an important part of understanding why venue is so crucial to protecting fairness for parties to litigation. This Part provides an introduction to venue and then discusses Florida's venue statute in particular.

### A. *The Ancient Origin of Venue*

*Black's Law Dictionary* defines "venue" as "[t]he proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant."<sup>5</sup> Unlike jurisdiction,<sup>6</sup> venue is a statutory device designed to ensure optimum convenience for parties and witnesses as well as an efficient allocation of judicial resources.<sup>7</sup> While jurisdiction is the *power* to adjudicate, venue dictates the *place* where courts may exercise judicial authority.<sup>8</sup> In other words, "Venue is a procedural concept that denotes the locality or geographical area in which a court with jurisdiction may litigate a suit."<sup>9</sup>

To fully understand the purpose of venue, one must fully understand its origin. The modern version of venue is traceable to the development of the English judicial system.<sup>10</sup> "Originally, venue referred to the county from which the court summoned jurors."<sup>11</sup> In their first capacity, jurors were responsible for actually questioning witnesses.<sup>12</sup> Logically then, selecting jurors from the area where the dispute transpired or where the land subject to litigation is located ensured that the court performed this

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4. See, e.g., ALA. CODE 1975 § 6-3-2 (2014) ("Venue of actions -- Against individuals"); 735 ILL. COMP. STAT. 5/2-101 (2014) (Illinois venue generally).

5. *Venue*, BLACK'S LAW DICTIONARY (10th ed. 2014).

6. For an introduction to personal jurisdiction, see Dane Reed Ullian, Note, *Retroactive Application of State Long-Arm Statutes*, 65 FLA. L. REV. 1653, 1657–60 (2013). For a discussion of personal jurisdiction in Florida specifically, see Cole Barnett, Note, *Is Injury a Tortious Act?: Interpreting Florida's Long-Arm Statute*, 66 FLA. L. REV. 2301, 2304 (2014).

7. *Venue*, BLACK'S LAW DICTIONARY, *supra* note 5 (citing JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.1, at 10 (2d ed. 1993)). Cf. Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1159–60 (2014) ("A foundational concept of American jurisprudence is the principle that it is unfair to allow litigants to be haled into far away tribunals when the litigants and the litigation have little or nothing to do with the location of such courts.").

8. *Venue*, BLACK'S LAW DICTIONARY, *supra* note 5 (citing CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 42, at 257 (5th ed. 1994)).

9. Craig A. Adoor & Joseph J. Simeone, *The Law of Venue in Missouri*, 32 ST. LOUIS U. L.J. 639, 639 (1988).

10. *Id.* at 641.

11. *Id.*

12. *Id.*

function properly.<sup>13</sup> In theory, jurors from the county where the events giving rise to the litigation took place would be knowledgeable when addressing the conflict at hand. Familiarity with the area, its residents, and local customs would allow jurors to render the fairest judgment possible. Most importantly, selecting jurors local to the dispute protected defendants from unwarranted prejudice that might exist if the jury considered the defendant an outsider.<sup>14</sup>

In modern American jurisdictions, statute controls venue.<sup>15</sup> Scholars assert that the purpose of present-day venue is to ensure convenience for the defendant,<sup>16</sup> preserving the goals of venue under English jurisprudence. The implementation of venue statutes in modern American jurisdictions is meant to achieve purposes that can be considered modern-day parallels of the earlier defendant-friendly goals.

### B. *Florida's Venue Statute*

In Florida, the county is the basic geographical territory for venue, and Florida has sixty-seven of them.<sup>17</sup> Though jurisdiction is state-wide,<sup>18</sup> for convenience of the parties, legislators found it proper to restrict a plaintiff's choices in venue to only a few possibilities by enacting Florida Statute § 47.011.<sup>19</sup> Florida's general venue statute provides three prongs for determining proper venue.<sup>20</sup> Those three prongs provide that the plaintiff can bring actions only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.<sup>21</sup> Special venue provisions implicated by certain types of actions limit the general venue statute.<sup>22</sup> When a special venue statute is more restrictive than the general venue statute, the special venue statute applies.<sup>23</sup>

The limitations on venue provided by § 47.011 were designed "[t]o save the defendant from expense, inconvenience, harassment, annoyance,

13. *See id.*

14. *See* FLORIDA BAR, *FLORIDA CIVIL PRACTICE BEFORE TRIAL* § 7.2 (11th ed. 2013), *CIVPRAC FL-CLE 7-1* (Westlaw).

15. *Adoor & Simeone, supra* note 9, at 642.

16. *Id.*

17. *See* FLORIDA BAR, *supra* note 14, § 7.1.

18. *Id.*

19. FLA. STAT. § 47.011 (2015). The scope of this Note is limited to situations in which there is a single defendant, though there are additional statutes that multiple defendant claims implicate. *See, e.g., id.* § 47.021 ("Actions against . . . defendants residing in different counties . . .").

20. *Id.* § 47.011.

21. *Id.*

22. *See, e.g., id.* § 63.102 (adoption); *id.* § 83.59(2) (landlord and tenant, residential).

23. FLORIDA BAR, *supra* note 14, § 7.10.

and, at times, local prejudice incident to defending a transitory action in a county of the plaintiff's choice."<sup>24</sup> Additionally, these limitations were meant to benefit defendants by establishing a level of predictability regarding where a plaintiff might sue a defendant and requiring a connection with the potential county where a defendant might be forced to appear in court. In other words, the Florida legislature intended venue to be a device that protects the interests of defendants.

## II. THE PROBLEM WITH FLORIDA STATUTE § 47.011: "WHERE THE CAUSE OF ACTION ACCRUED"

Application of Florida's venue statute produces relatively predictable and equitable results for defendants in many situations. These predictable situations include causes of action implicating the first prong<sup>25</sup>—the plaintiff brings suit in a county where the defendant resides—and the third prong<sup>26</sup>—the plaintiff brings suit where the property in litigation is located. Those clear-cut provisions indicate definitively where venue should lie. However, this is not the case for causes of action implicating the second prong of the venue statute. The second prong, referred to as the "accrual test," states that the plaintiff shall bring an action "where the cause of action accrued."<sup>27</sup>

Causes of action that implicate the accrual test have been the source of much confusion.<sup>28</sup> When the essential elements of a cause of action occur in one location, determining where the action accrued is very simple. Consider battery, which requires intent to contact another, actual offensive contact to another, and failure to consent to the contact.<sup>29</sup> Generally, those elements occur in the same location, and thus venue in actions for battery is simple to determine. When the essential elements of a cause of action occur in different places, however, the situation becomes more ambiguous. Consequently, when parties challenge venue because the essential elements of a cause of action do not take place in

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24. See FLORIDA BAR, *supra* note 14, § 7.2.

25. FLA. STAT. § 47.011.

26. *Id.*

27. *Id.*

28. See, e.g., *Moscowitz v. Oldham*, 48 So. 3d 136 (Fla. Dist. Ct. App. 2010) (holding that the client's claims did not accrue in the county where the attorney directed the client to testify falsely); *Fontana v. Hugo Int'l*, 781 So. 2d 433 (Fla. Dist. Ct. App. 2001) (holding that the cause of action did not accrue where the plaintiff felt the effect, but where intentional interference took place); *Wincor v. Cedars Healthcare Grp., Ltd.*, 695 So. 2d 924 (Fla. Dist. Ct. App. 1997) (holding that venue was proper in the county where injuries allegedly occurred); *Weiner v. Prudential Mortg. Inv'rs, Inc.*, 557 So. 2d 912 (Fla. Dist. Ct. App. 1990) (holding that the cause of action accrued where the defendants were to have performed the promised services).

29. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 (AM. LAW INST. 2014).

the same county, Florida courts must interpret and apply the accrual test to determine where venue is proper.<sup>30</sup> The failures of § 47.011 to accomplish its objectives become clear in the application of these interpretations.

Florida's Third DCA articulated the most prominent interpretation of the accrual test in 1986, when it decided *Tucker v. Fianson*.<sup>31</sup> *Tucker* is instructive for three reasons. First, it provides an "answer" to where an action for tort accrues when the essential elements of the tort occur in multiple places.<sup>32</sup> Second, *Tucker* provides the specific test for accrual in actions for legal malpractice.<sup>33</sup> Third, *Tucker* serves as the basis for the specific test for accrual in actions for tortious interference as articulated by Florida's Second DCA in *Langan Engineering and Environmental Services, Inc. v. Harris Constructors, Inc.*<sup>34</sup> This Part discusses the development of *Tucker* and its progeny.

#### A. *Tucker (Part 1): The Cause of Action Accrues Where the Tort Is Complete*

Probably the most cited language from *Tucker v. Fianson* comes from its answer to the question of where a cause of action accrues when a tort occurs across multiple counties.<sup>35</sup> Defendant H. Allan Tucker was an attorney practicing and residing in Broward County.<sup>36</sup> In the course of his practice, Tucker gave legal advice to a client regarding the condominium conversion of a building the client owned in Dade County.<sup>37</sup> The client later alleged that the advice she received from Tucker in Broward County was negligent.<sup>38</sup> She subsequently sued Tucker for legal malpractice in a Dade County court.<sup>39</sup> Tucker moved to transfer venue to a court in Broward County, where he worked on the matter in question.<sup>40</sup>

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30. See, e.g., *Tucker v. Fianson*, 484 So. 2d 1370 (Fla. Dist. Ct. App. 1986) (addressing an action in which negligence took place in one county, but the plaintiff experienced damages in another county); *Gaboury v. Flagler Hosp., Inc.*, 316 So. 2d 642 (Fla. Dist. Ct. App. 1975) (addressing an action in which the defendants negligently treated the decedent in one county, but the decedent died in another).

31. 484 So. 2d at 1371.

32. *Tucker*, 484 So. 2d at 1371.

33. *Id.* at 1372 ("[V]enue in the ensuing malpractice action was properly laid in the latter district where the economic damage had been done.").

34. 743 So. 2d 1177, 1177–78 (Fla. Dist. Ct. App. 1999) (per curiam).

35. *Tucker*, 484 So. 2d at 1371.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*



In its analysis, the court first addressed the question of where a cause of action accrues.<sup>41</sup> Quoting the Supreme Court of Alaska in its *Ebell v. Seapac Fisheries, Inc.*<sup>42</sup> decision, the *Tucker* court stated:

[W]e adopt and apply the rule that, for venue purposes, a tort claim is deemed to have accrued “where the last event necessary to make the defendant liable for the tort took place. . . . Thus, a claim for tort arose where the harmful force first took effect, or where the plaintiff suffered injury.”<sup>43</sup>

The court then addressed the specific quandary of the “inter-county situation,”<sup>44</sup> in which a “tortfeasor has committed a wrongful act in one place which has taken effect by causing damage in another.”<sup>45</sup> The court held that in these situations, “the rule is well established that a cause of action accrues where the plaintiff suffers his or her injuries.”<sup>46</sup> *Tucker*’s interpretation of this broad rule is the basis for its value as precedent because it explains the relationship between injury and accrual.

*Black’s Law Dictionary* defines “injury” as “[t]he violation of another’s legal right, for which the law provides a remedy.”<sup>47</sup> Further, the *Restatement (First) of Torts* notes that if an injury is the result of a tortious act, then the person suffering the harm is entitled “to maintain an action of tort.”<sup>48</sup> Because injury triggers the right to bring an action, the infliction of injury must also mean that the tort is complete.<sup>49</sup> Therefore, the *Tucker* court indicated that the cause of action accrues in the place where the tort can be considered complete.<sup>50</sup> This broad statement serves as a guide for the *Tucker* court and for future courts to follow because it provides the connection from injury to completion and from completion to accrual.

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41. *Id.*

42. 692 P.2d 956, 957 (Alaska 1984).

43. *Tucker*, 484 So. 2d at 1371 (footnote omitted) (quoting *Ebell*, 692 P.2d at 957).

44. *Id.*

45. *Id.*

46. *Id.* at 1371 (quoting *Pearson v. Wallace Aviation, Inc.*, 400 So. 2d 50, 51 (Fla. Dist. Ct. App. 1981)).

47. *Injury*, BLACK’S LAW DICTIONARY (10th ed. 2014).

48. RESTATEMENT (FIRST) OF TORTS § 7 cmt. a (1934).

49. It is a well-established rule that a tort is complete when damage or harm occurs. *McIntyre v. McCloud*, 334 So. 2d 171, 172 (Fla. Dist. Ct. App. 1976) (citing *Scott-Steven Dev. Corp. v. Gables by the Sea, Inc.*, 167 So. 2d 763 (Fla. Dist. Ct. App. 1964) (“The law furnishes a remedy only for such wrongful acts as result in injury or damage.”)); *Duchaine v. Grosco Realty, Inc.*, 121 So. 2d 679 (Fla. Dist. Ct. App. 1960) (“[A] wrongful act does not constitute a good cause of action unless such wrongful act results in injury.”).

50. *See Tucker*, 484 So. 2d at 1371.

### B. Tucker (*Part 2*): *Actions for Professional Malpractice and the Effects Test*

After stating the broad definition of accrual, the *Tucker* court proceeded to apply that definition in its analysis of proper venue in legal malpractice actions specifically.<sup>51</sup> The court affirmed the lower court's ruling denying transfer of venue and noted that "the cause of action 'accrued' under section 47.011, Florida Statutes (1985) in Dade County, where the defendant's asserted negligence impacted upon the plaintiff's economic interests."<sup>52</sup>

In his counterargument, Tucker asserted that *Gaboury v. Flagler Hospital*,<sup>53</sup> a medical malpractice case, should control.<sup>54</sup> In *Gaboury*, the plaintiffs brought action against the defendant physician for negligent treatment that resulted in the death of the plaintiffs' daughter.<sup>55</sup> The defendant treated the decedent at a hospital in St. Johns County, but after being released, the decedent later died in Orange County.<sup>56</sup> Florida's Fourth DCA affirmed the lower decision, holding that venue was proper where

the act creating the right to bring an action occurred, and when a tort is complete in a particular county, the cause of action is deemed to have accrued there so as to fix venue, notwithstanding that the plaintiff may have suffered damages, and even his greatest damage, in another county.<sup>57</sup>

Tucker used the *Gaboury* language that "a cause of action is said to arise at the *place where the act creating the right to bring an action occurred*,"<sup>58</sup> to argue that the cause of action accrued in his Broward County office because his allegedly negligent act occurred there.<sup>59</sup> The *Tucker* court distinguished *Gaboury* and asserted that though the *Gaboury* court expressed the "broad doctrine in somewhat different terms, the precise determination was that the malpractice-wrongful death action accrued where the defendant negligently treated the decedent—where, in other words, the negligence first took effect upon her body—even though she died in another county."<sup>60</sup> The court continued by noting

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51. *Id.* at 1372.

52. *Id.* at 1371 (footnote omitted).

53. 316 So. 2d 642, 643 (Fla. Dist. Ct. App. 1975).

54. *See Tucker*, 484 So. 2d at 1371 n.3.

55. *Gaboury*, 316 So. 2d at 643.

56. *Id.*

57. *Id.* at 644 (emphasis omitted).

58. *Tucker*, 484 So. 2d at 1371 n.3 (quoting *Gaboury*, 316 So. 2d at 644).

59. *See id.*

60. *Id.* at 1371–72 (footnote omitted).

that “even under this formulation, it is clear that the critical ‘act’ is often not the wrongful conduct of the defendant, but its adverse impact upon the plaintiff.”<sup>61</sup>

Thus, after *Tucker*, courts apply the accrual test in cases of professional malpractice by determining “where the last event necessary to make the defendant liable for the tort took place.”<sup>62</sup> To reconcile this decision with *Gaboury*, which stated that a “cause of action is said to arise at the *place where the act creating the right to bring an action occurred*,”<sup>63</sup> the *Tucker* court interprets “act” as an “adverse impact upon the plaintiff.”<sup>64</sup> The court added that the plaintiff feels the injury where the harmful force *first* takes effect, even if the plaintiff sustains the greatest damage in another county.<sup>65</sup> Thus, the standard that Florida courts rely upon in cases of professional malpractice is the “effects test”: the tort is complete, and therefore the cause of action accrues, where the plaintiff first experiences the harmful effects of the alleged negligence.

### C. Langan: *Tortious Interference and the Overt Acts Test*

In 1999, Florida’s Second DCA decided *Langan Engineering and Environmental Services, Inc. v. Harris Constructors, Inc.*<sup>66</sup> In *Langan*, an action for tortious interference, the court cited *Tucker*<sup>67</sup> but developed a venue test that is much different from the effects test.<sup>68</sup>

Harris Constructors, Inc. (Harris), brought action against Langan Engineering (Langan).<sup>69</sup> Harris alleged that Langan intentionally interfered with Harris’s business relationship with a third party,<sup>70</sup> resulting in the loss of a business project for Harris in Dade County.<sup>71</sup> Harris brought suit in Pinellas County where its office is located, even though the loss of the project occurred in Dade County.<sup>72</sup>

The court began by citing the famous language from *Tucker*: “[F]or venue purposes, a tort claim is deemed to have accrued where the last

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61. *Id.* at 1372 n.3.

62. *Id.* at 1371 (quoting *Ebell v. Seapac Fisheries, Inc.*, 692 P.2d 956, 957 (Alaska 1984)).

63. *Gaboury*, 316 So. 2d at 643.

64. *Tucker*, 484 So. 2d at 1372 n.3.

65. *Id.* at 1372.

66. 743 So. 2d 1177 (Fla. Dist. Ct. App. 1999) (per curiam).

67. *Id.* at 1177–78 (citing *Tucker*, 484 So. 2d at 1371).

68. *Id.* (“For venue purposes, a cause of action for tortious interference with a contract or advantageous business relationship accrues in the county where overt acts constituting the interference occurred.”).

69. *Id.* at 1177.

70. *Id.*

71. *Id.*

72. *Id.*

event necessary to make the defendant liable for the tort took place.”<sup>73</sup> The court then noted the lower court’s application of the effects test, which relied on language from *Tucker* “that a cause of action for legal malpractice ‘accrued’ for venue purposes ‘where the defendant’s asserted negligence impacted upon the plaintiff’s economic interests.’”<sup>74</sup> The lower court reasoned that because Harris did not receive payment at its office in Pinellas County and resultantly felt the economic damage there,<sup>75</sup> venue was proper in Pinellas County.<sup>76</sup> The court, however, disagreed with the lower court’s interpretation<sup>77</sup> and instead relied upon an alternate interpretation of the same *Tucker* language found in *Williams v. Goldsmith*.<sup>78</sup>

In *Williams*, decided by Florida’s Third DCA, the defendant attorney was a partner employed by the plaintiff law firm in its office in Brevard County.<sup>79</sup> The defendant left the plaintiff firm, taking many of the firm’s clients with him.<sup>80</sup> The plaintiff law firm subsequently sued the defendant for tortious interference with contract in Dade County, where the plaintiff law firm had another office.<sup>81</sup> The defendant moved to transfer venue to Brevard County, and the trial court denied the motion.<sup>82</sup> The defendant subsequently appealed.<sup>83</sup>

The court ruled that the alleged breach “occurred in [Brevard County] when appellant left the firm and wooed clients away from the firm.”<sup>84</sup> Resultantly, the court reversed the lower court’s order denying the appellant’s motion to transfer venue.<sup>85</sup> The court quoted *Tucker*: “For venue purposes, a tort claim ‘is deemed to have accrued where the last event necessary to make the defendant liable for the tort took place.’ In other words, a tort accrues where the plaintiff first suffers injury.”<sup>86</sup> The court then stated, “[W]e conclude that the injuries or damages first occurred in Brevard County. In the tortious interference with contract claim, the last event necessary to make appellant liable was luring the

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73. *Id.* at 1177–78 (alteration in original) (quoting *Tucker v. Fianson*, 484 So. 2d 1370, 1371 (Fla. Dist. Ct. App. 1986)).

74. *Id.* at 1178 (quoting *Tucker*, 484 So. at 1371).

75. *Id.*

76. *Id.*

77. *Id.*

78. 619 So. 2d 330, 332 (Fla. Dist. Ct. App. 1993) (per curiam) (quoting *Tucker*, 484 So.2d at 1371).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting *Tucker v. Fianson*, 484 So. 2d 1370 (Fla. Dist. Ct. App. 1986)).

firm's clients away in Brevard County. Hence, the injury was the loss of the clients."<sup>87</sup> In other words, the *Williams* court determined that injury occurred when the defendant lured the clients away.<sup>88</sup>

When applying *Tucker* in light of the *Williams* decision, the *Langan* court disagreed with the trial court's interpretation of *Tucker*, which applied the effects test.<sup>89</sup> The *Langan* court noted that the Third DCA in *Williams* specifically interpreted this same statement in *Tucker* to mean that a "tort accrues where the plaintiff first suffers injury."<sup>90</sup> The court concluded that "a cause of action for tortious interference with a contract or advantageous business relationship accrues in the county where overt acts constituting the interference occurred."<sup>91</sup>

An overt acts test for tortious interference actions results because the court ruled that venue is proper where the appellant did the luring.<sup>92</sup> The *Langan* court cited language from *Tucker*,<sup>93</sup> affirming that the cause of action accrues when injury occurs, signaling that the tort is complete.<sup>94</sup> Though the lower court went a step further with *Tucker* and applied its effects test,<sup>95</sup> the *Langan* court chose an interpretation of *Tucker* that separated the "injury" from the economic harm.<sup>96</sup> This seems contradictory as both the *Williams* and *Langan* courts applied a *Tucker* analysis, implicating the effects test, but then articulated overt acts tests as conclusions.<sup>97</sup> Despite the irony, the *Langan* court announced the standard for tortious interference: venue is proper where the overt acts constituting the interference and injury take place.<sup>98</sup>

87. *Id.*

88. *Id.*

89. *Langan Eng'g & Envtl. Servs., Inc. v. Harris Constructors*, 743 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1999) (per curiam).

90. *Id.* (quoting *Williams*, 619 So. 2d at 332).

91. *Id.*

92. Though this case articulates the overt acts test and this test would otherwise apply to these facts, the court concluded by stating that "[i]n this case, we cannot determine where the injury occurred because the record does not reveal where Langan allegedly made the defamatory statements or where Clark maintains its offices. Therefore, the statute alternatively requires venue where Langan maintains its Florida offices, that is, Dade County." *Id.* at 1178.

93. *Langan*, 743 So. 2d at 1177–78 (quoting *Tucker v. Fianson*, 484 So. 2d 1370 (Fla. Dist. Ct. App. 1986)).

94. *Id.* at 1178.

95. *See id.* ("The trial court relied on the Third District's statement in *Tucker* that a cause of action for legal malpractice 'accrued' for venue purposes 'where the defendant's asserted negligence impacted upon the plaintiff's economic interests.'" (quoting *Tucker*, 484 So. 2d at 1371)).

96. *Id.*

97. *Langan*, 743 So. 2d at 1178; *Williams*, 619 So. 2d at 332.

98. *Langan*, 743 So. 2d at 1178.

### III. WHY NEITHER THE EFFECTS TEST NOR THE OVERT ACTS TEST ARE PROPER, WHAT THAT SAYS ABOUT THE VENUE STATUTE, AND WHY IT MATTERS

This Part argues that though the effects test articulated in *Tucker* is the correct interpretation of the accrual provision of Florida's venue statute, it contravenes the policy of venue by disadvantaging the defendant. In contrast, though the overt acts test in *Langan* advances the policy of venue because it results in equitable venue for defendants, it is an incorrect interpretation of the accrual provision of Florida's venue statute. This Part then explains that it is important to remedy this tension because the law as it stands may disadvantage thousands of Florida defendants.

#### A. *Why Tucker Gets "Accrual" Right and Langan Gets "Accrual" Wrong*

*Tucker* articulates very clearly that a right of action accrues when a tort is complete. This is a relatively uncontested concept as *Tucker* specifically requires injury,<sup>99</sup> and it is a well-known rule that a tort is complete upon injury. If one considers the definitions of malpractice and tortious interference in light of this articulation—that a tort is not complete until injury has occurred—and applies the tests Florida courts use to determine where those torts are "complete," it becomes apparent that the overt acts test improperly fails to make a distinction between act and injury. This means that for torts where the act and injury are temporally and physically separated, the overt acts test may fail to find venue where the tort is complete, as Florida's venue statute requires.

*Black's Law Dictionary* defines the tort of malpractice as "[a]n instance of negligence or incompetence on the part of a professional."<sup>100</sup> Additionally, "[t]o succeed in a malpractice claim, a plaintiff must also prove proximate cause and damages."<sup>101</sup> This blanket definition applies to both legal and medical malpractice; the only difference is in the type of duty required by the profession.<sup>102</sup>

Based on the legal definition of malpractice, the effects test articulated in *Tucker* is the proper interpretation of the accrual provision of Florida's venue statute. The definition of malpractice explicitly states that succeeding in a malpractice claim requires proof of injury.<sup>103</sup> Thus, the tort cannot be complete, and therefore the cause of action for malpractice cannot accrue, until the plaintiff experiences the injury. This is exactly

99. *Langan*, 743 So. 2d at 1178; *Williams*, 619 So. 2d at 332.

100. *Malpractice*, BLACK'S LAW DICTIONARY (10th ed. 2014).

101. *Id.*

102. *See id.*

103. *See id.*

what the effects test requires. The effects test states that the tort is complete, and therefore the cause of action accrues, where the plaintiff first experiences the harmful effects of the alleged negligence.<sup>104</sup>

The definition of tortious interference is “[a]n intentional, damaging intrusion on another’s potential business relationship, such as the opportunity of obtaining customers or employment.”<sup>105</sup> A second definition explicitly adds that the interference must cause “damage to the relationship between the contracting parties.”<sup>106</sup>

Based on the legal definition of tortious interference, the overt acts test articulated in *Langan* is an improper interpretation of the accrual provision of Florida’s venue statute. The definition of tortious interference requires that the “intrusion on another’s potential business relationship” be “damaging.”<sup>107</sup> Thus, not only must the intrusion on the potential business relationship be intentional, it must also cause injury. This is where the overt acts test fails.

In articulating the overt acts test, the *Langan* court reasoned that “the last event necessary to make Langan liable was its interference with Harris’ business relationship with Clark in Dade County. The injury was the loss of the subcontract.”<sup>108</sup> The problem with this line of reasoning is the way in which the *Langan* court meshes the loss of the subcontract (the injury) with the interference (the overt act).

Again, according to the broad statement of *Tucker*, the cause of action accrues where the tort is complete, and venue is proper where the action accrues.<sup>109</sup> By definition, the tort of intentional interference is not complete until there is injury.<sup>110</sup> Because the overt acts test indicates that venue is proper where the overt acts constituting the interference took place, this test could be a proper interpretation of accrual *only if* the interference and injury were simultaneous and somehow joined together. In other words, if the act of interference is at all separable from the injury felt, the overt acts test is illogical because a tort cannot be complete without injury. In this instance, the act and the injury are indeed separable.

104. See *supra* notes 62–65.

105. *Tortious Interference with Prospective Advantage*, BLACK’S LAW DICTIONARY (10th ed. 2014).

106. *Tortious Interference with Contractual Relations*, BLACK’S LAW DICTIONARY (10th ed. 2014).

107. *Tortious Interference with Prospective Advantage*, BLACK’S LAW DICTIONARY (10th ed. 2014).

108. *Langan Eng’g & Envtl. Servs., Inc. v. Harris Constructors*, 743 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1999) (per curiam).

109. See *Tucker v. Fianson*, 484 So. 2d 1370, 1371 (Fla. Dist. Ct. App. 1986).

110. *Tortious Interference with Contractual Relations*, BLACK’S LAW DICTIONARY, *supra* note 106.

The *Langan* court identifies the loss of the subcontract as the injury and implies that the injury occurred simultaneously with Langan's overt acts of interference in Dade County.<sup>111</sup> However, unless the third party was acting without any independence, a court must separate the damage from the act of interference. One can assume that the third party with whom Langan interfered had some autonomy in deciding to abandon the subcontract with Harris. Even though Langan prompted the third party to abandon the subcontract, at some point the third party had to affirmatively choose to do so. Until the third party acted upon Langan's promptings, injury was hypothetical, and therefore the tort was incomplete. In theory, the third party could have ignored Langan's promptings and continued in the contract with Harris. In that scenario, despite Langan's alleged interference, there would be no injury. Tortious interference is complete only when it has resulted in concrete injury.<sup>112</sup> Since the overt acts test can be satisfied prior to the actualization of injury, it is an improper interpretation of accrual.

#### B. *Why Langan Gets Policy Right and Tucker Gets Policy Wrong*

Although *Tucker* and its effects test present the correct interpretation of the accrual provision of Florida's venue statute, implementation of the effects test can disadvantage defendants. In contrast, although the overt acts test is an incorrect interpretation of the accrual provision, it produces venue results that ensure fairness and convenience for defendants.

To exemplify this disadvantage, consider two defendants this Note discussed above, H. Allan Tucker and Langan Engineering. Though the same case law controlled venue in both of these actions, Tucker was the only defendant forced to defend himself in a county where he neither resided, practiced, nor acted in regard to the matter in question.<sup>113</sup> This is an example of the way in which attorneys are disadvantaged because of the nature of legal malpractice when a court applies the effects test.

Further, following the effects test to its logical conclusion, an attorney working in her office in South Florida could give professional advice to a client in her office that the client later alleges was negligent. The client might have acted on said advice in North Florida without the South Florida attorney's knowledge of the client's intention to do so, and thus any potential injury to the client may have occurred there. Applying the

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111. See *Langan*, 743 So. 2d at 1178.

112. *Tortious Interference with Contractual Relations*, BLACK'S LAW DICTIONARY, *supra* note 106.

113. Compare *Tucker*, 484 So. 2d at 1371–72 (ruling that even though Tucker practiced, resided, and "shot his arrow into the air of Broward County," venue was proper in Dade County), with *Langan*, 743 So. 2d at 1178 (holding that venue in Dade County where Langan maintained its Florida office was proper).



effects test, the cause of action would accrue in North Florida where the client acted upon the advice, not in South Florida where the attorney acted by giving the allegedly negligent advice. In this case, the effects test would force the attorney to defend herself in a court hundreds of miles away in a county where she never expected to appear, putting her at a severe disadvantage.<sup>114</sup>

Florida's large size further exaggerates this problem, as defending across state could mean traveling significantly extended distances. If a plaintiff showed, for example, that he acted in Panama City upon an attorney's negligent advice given in Miami and thus he felt the effects in Panama City, the effects test would hale the attorney into court in a county roughly 580 miles away from where he practices.<sup>115</sup> This might seem far-fetched, but this is just a slight modification of the facts found in *Tucker*. It is clear that the effects test does not advance the purposes that the Florida legislature intended the venue statute to achieve.

### C. *The Importance of Solving the Venue Problem: Defendants Are at Risk*

Though there are other scenarios in which the accrual provision of the venue statute creates a disadvantage for defendants, this Section frames the urgency of the problem with the plight of attorneys who could be defendants in legal malpractice actions. The recent climb in the number of legal malpractice claims across the country confirms the necessity of a solution to the venue disadvantage. Every four years, the American Bar Association (ABA) publishes a study detailing trends in legal malpractice from data provided by malpractice-insurance carriers.<sup>116</sup> Though it is "virtually impossible"<sup>117</sup> to gather "across-the-profession data on legal malpractice errors"<sup>118</sup> because multiple legal professional liability insurers exist in each state and because many U.S. attorneys do not have malpractice insurance,<sup>119</sup> the numbers that the ABA committee has been

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114. Though venue is in some ways meant to protect the plaintiff's interests as well, since the plaintiff would have sought out the attorney's counsel in the county where the attorney was practicing, the plaintiff would not be surprised to face an action in that county.

115. Driving Directions from Panama City, FL to Miami, FL, [GOOGLEMAPS](https://www.google.com/maps), <https://www.google.com/maps> (follow "Get Directions" hyperlink; then search "A" for "Panama City, FL," and search "B" for "Miami, FL"; then follow "Get Directions" hyperlink).

116. *Profile of Legal Malpractice Claims*, AM. BAR ASS'N, <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=213575> (last visited Jan. 21, 2016).

117. Daniel E. Pinnington, *ARE YOU AT RISK?: The Biggest Malpractice Claim Risks and How to Avoid Them*, 36 LAW PRAC. 29, July/August 2010, at 29, [http://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_articles\\_v36\\_is4\\_pg29.html](http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg29.html).

118. *Id.*

119. *Id.*

able to gather are still staggering. In the most recent study published in 2011, there were 53,000 legal malpractice claims reported.<sup>120</sup> That is the highest number of claims reported in any study thus far.<sup>121</sup> Further, "20.3% of reported malpractice claims during the study period involved matters in both residential and commercial real estate transactions."<sup>122</sup> Considering that the facts of *Tucker* center upon a real estate transaction,<sup>123</sup> one can assume that a great provision of at least twenty percent of malpractice actions have the potential to put a defending attorney at an unfair disadvantage when it comes to the determination of venue.

In light of the upward trend in the number of malpractice claims filed,<sup>124</sup> one can infer that the next study the ABA publishes on this issue will show even higher numbers and therefore increased risk of serious disadvantage under the current test used for venue determination in legal malpractice cases.

#### IV. A PROPOSED SOLUTION: ELIMINATING THE ACCRUAL PROVISION OF THE VENUE STATUTE

Many other states have, like Florida, adopted a venue statute with an accrual prong.<sup>125</sup> Broad use, however, does not equate to propriety. There are many long-standing practices that are not beneficial but are nevertheless preserved as a matter of convenience, and applying the effects test to determine venue in professional malpractice cases is one of them. The resulting inequity in Florida is indicative of a broader need for change in states with similar provisions nationwide.

In fact, several states that employed venue statutes with accrual provisions or other similar language have since revised their venue statutes in the interest of fairness.<sup>126</sup> These states include Alabama, Arkansas, Louisiana, Mississippi, Missouri, South Carolina, and West Virginia.<sup>127</sup>

120. Todd C. Scott, *Recent ABA Study Suggests Emerging New Trends in Legal Malpractice*, 28 MINN. LAW. MUTUAL, Oct. 2012, <https://www.mlmins.com/Library/The%20View%20Newsletter%20October%202012.pdf>.

121. Pinnington, *supra* note 117.

122. Scott, *supra* note 120.

123. *See Tucker v. Fianson*, 484 So. 2d 1370, 1371 (Fla. Dist. Ct. App. 1986).

124. Scott, *supra* note 120.

125. Though these statutes do not mention "accrual," courts interpret their tests based on "where the cause of action arose" similarly to accrual. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-101 (2014) (Illinois venue generally); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2013) ("Venue: General Rule"); W. VA. CODE § 56-1-1 (2007) ("Venue generally").

126. *See, e.g.*, MISS. CODE ANN. § 11-11-3 (2004) (Venue generally).

127. *Forum and Venue Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/forum-and-venue-reform> (last visited Oct. 24, 2015).

In 1999, Alabama amended its venue statute.<sup>128</sup> Venue is now proper in the county where the defendant resides or where the property in litigation is located, with a few other established exceptions.<sup>129</sup> In the committee comments on the new statute's adoption, the committee provides, "The law provision seems preferable because in tort cases the county where the claim arose will frequently be most convenient for witnesses, for a view by the jurors, etc."<sup>130</sup>

Mississippi has gone to great lengths to ensure that its court system treats all parties to litigation fairly.<sup>131</sup> In fact, in 2004, Mississippi instituted new venue provisions<sup>132</sup> establishing that venue is proper where the defendant resides or where a substantial act, omission, or event occurred.<sup>133</sup> These tests produce venue outcomes that are fair and predictable for all defendants. Mississippi even went as far as to offer a provision designed to protect defendants in medical malpractice actions potentially disadvantaged by an effects test rule.<sup>134</sup> The "substantial act or omission test"<sup>135</sup> would produce the type of equitable result that *Langan's* overt acts test produces, only in accordance with the general venue provision.<sup>136</sup> According to the Mississippi Development Authority, the new provisions ensure "fairness in the courtroom for everyone."<sup>137</sup>

In light of the measures taken by other states to ensure their venue statutes were protecting the interests they were intended to, a solution exists. Florida should remove the accrual provision of the venue statute altogether, leaving a venue statute similar to that of Louisiana.<sup>138</sup> Though several states have adopted statutes similar to Louisiana's, this Section focuses specifically on Louisiana's statute because Louisiana courts have interpreted it, whereas other states with similar statutes have not yet had their courts interpret them.

The accrual prong of Florida's venue statute has caused confusion as evidenced by the cases mentioned above, all centering upon its

128. *See id.*

129. ALA. CODE § 6-3-2b (2013) ("Venue of actions -- Against individuals.").

130. *Committee Comment on Adoption*, ALA. R. CIV. P. 82 (2013).

131. *Tort Reform Act of 2004*, MISS. DEV. AUTH., <http://www.mississippi.org/mda-library-resources/resources/tort-reform-act-of-2004.html> (last visited Jan. 21, 2016) (known as "House Bill 13").

132. *See id.*

133. MISS. CODE ANN. § 11-11-3 (2004).

134. *Id.* § 11-11-3(3) ("[A]ny action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner . . . including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake . . . shall be brought only in the county in which the alleged act or omission occurred.").

135. *Id.* § 11-11-3(1).

136. *See id.* § 11-11-3.

137. *See Tort Reform Act of 2004*, *supra* note 131.

138. LA. CODE CIV. PROC. ANN. art. 42 (2012).

ambiguity. One solution to this ambiguity and potential inequity is to remove the accrual prong of the venue statute altogether. The Louisiana legislature has adopted this approach, resulting in a venue statute that provides both predictability and uniformity in venue determinations.

The Louisiana venue statute<sup>139</sup> contains seven provisions applicable to determining venue based solely on the type of party named as the defendant in the action.<sup>140</sup> The provisions prescribe venue for actions brought against individuals, domestic corporations and partnerships, foreign corporations licensed and non-licensed in Louisiana, non-residents, and foreign insurers based upon either where the defendant resides or operates its business.<sup>141</sup> For example, "The general rules of venue are that an action against . . . [a]n individual who is domiciled in the state shall be brought in the parish of his domicile; or if he resides but is not domiciled in the state, in the parish of his residence."<sup>142</sup> Unlike Florida, the Louisiana provision does not take into account where the cause of action accrued; rather, it names one specific venue for causes of action dependent upon the geographical location of the defendant.

Recognizing that the general provision might not be informative in some situations, the Louisiana legislature created a number of exceptions to the provision, including exceptions for actions involving immovable property,<sup>143</sup> actions on contract,<sup>144</sup> and actions involving joint or solidary obligors.<sup>145</sup> Overall and understandably so, employing a general provision that concretely prescribes venue with a certain number of named exceptions effectively streamlines venue determination. This is different from a statute such as Florida's, which includes a test that courts must interpret according to the facts on a case-by-case basis.

Regarding actions involving legal malpractice specifically, under the Louisiana statute, the determination of venue is both straightforward and predictable. For example, in *Frisard v. State Farm Fire and Casualty Co.*,<sup>146</sup> the court affirmed the defendant's exception of venue and transferred the case to St. Tammany Parish,<sup>147</sup> where the defendant resided and practiced law.<sup>148</sup> The plaintiff, Dan Frisard, brought an action

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* art. 42(1).

143. *Id.* art. 80.

144. *Id.* art. 76.1.

145. *Id.* art. 73.

146. 837 So. 2d 706 (La. Ct. App. 2003).

147. Instead of counties, Louisiana is divided into parishes.

148. *Frisard*, 837 So. 2d at 708.

for malpractice against attorney William Lozes.<sup>149</sup> Frisard alleged that the attorney's actions in failing to properly defend him constituted malpractice.<sup>150</sup> Frisard filed his lawsuit in the 24th Judicial District Court in Jefferson Parish; subsequently, Lozes filed an exception of improper venue and requested transfer to St. Tammany Parish.<sup>151</sup>

The trial court granted the request, relying on Louisiana's general rules of venue, which state that a plaintiff must bring suit against an individual domiciled in the state of Louisiana in the parish of the individual's domicile.<sup>152</sup> The lower court found that Lozes was domiciled in St. Tammany Parish, and thus Frisard should have brought suit there.<sup>153</sup> The court affirmed the judgment entered below.<sup>154</sup>

The appellate court stated, "The Louisiana Supreme Court has held that in a malpractice action, venue is proper in the parish where the wrongful conduct occurred."<sup>155</sup> Though Frisard argued that the wrongful conduct in this case occurred in Jefferson Parish where Lozes failed to file pleadings, the court determined that Lozes was a resident of St. Tammany Parish and his law office and entire practice are located in St. Tammany Parish.<sup>156</sup>

The court reasoned that "although plaintiff . . . asserts that defendants failed to file pleadings on his behalf in the Jefferson Parish suit, this allegation alone fails to establish that defendants' alleged wrongful conduct occurred in Jefferson Parish."<sup>157</sup> The opinion further states, "[A]ny alleged wrongful conduct on the part of defendants occurred in St. Tammany Parish where their law offices were located. In this case, the acts or failure to act on the part of defendants occurred in their law offices where they handled the defense of the lawsuits filed against Mr. Frisard."<sup>158</sup>

A venue provision such as Louisiana's produces uniform and predictable results, which becomes apparent in reviewing Louisiana's

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149. Porteous, Hainkel, Johnson and Sarpy Law Firm employed attorney Lozes, and State Farm appointed Lozes as Frisard's attorney as part of Frisard's liability insurance. *Id.* at 707. This action was in addition to Frisard's charges against State Farm and the entire law firm. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 707–08.

153. *Id.* at 708.

154. *Id.*

155. *Id.* (citing *Chambers v. LeBlanc*, 598 So. 2d 337, 337–38 (La. 1992)). The court cited this language from the Louisiana state court despite Frisard's argument that the malpractice fell under Louisiana's Code of Civil Procedure, article 74. *Id.* Article 74 is an exception to the general venue statute, which states that "[a]n action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained." LA. CODE CIV. PROC. ANN. art. 74 (2012).

156. *Frisard*, 837 So. 2d at 708.

157. *Id.*

158. *Id.*

venue case law. Whereas applying a fact-specific accrual test to every action sounding in tort can produce venue results that might vary from case to case, establishing one general venue provision for all types of cases with only certain exceptions carved out in advance produces outcomes that are both equitable and highly predictable. Louisiana's venue statute produces outcomes that achieve the purposes the Louisiana legislature intended it to further.

#### CONCLUSION

Florida Statute § 47.011 is intended to ensure convenience and fairness for parties to litigation, especially the defendant. Because Florida's current venue statute is an impediment to fair trial for some defendants, resolving this issue is critical. Since courts cannot properly interpret the accrual provision of § 47.011 without contravening the policy behind venue, the Florida legislature should follow other states that have abandoned the accrual language<sup>159</sup> and that adopted venue statutes that better serve the interests venue was intended to promote. The Florida legislature should amend § 47.011 of the Florida Statutes to exclude the accrual provision.

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159. Or "arising under" language.

